FILED

94 487 SEP - 1 1993

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ELLEN BRASWELL,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ellen Braswell
4034 North Joelton
Agoura, California 91301
(818) 991-0590

September, 1993 Petitioner, In Pro Per

65 pp

QUESTIONS PRESENTED

1. Whether the District and Appellate Courts prejudicially erred in denying plaintiff's requests for court-appointed attorney to handle her complex, essentially Title VII[1] employment discrimination case when they construed Bradshaw vs. Zoological Soc. of San Diego[2] in such a way (with respect to the level of merit that needs to be showing in order for a plaintiff to be appointed an attorney to handle a Title VII case) as to make it dependent on the particular stage that case is at (whether the case is at the motion to dismiss stage or at the summary judgment stage, and so forth), indicating that the level of merit that

---

[1]Civil Rights Act of 1964, as amended

[2]662 F.2d 1301 (9th Cir. 1981)

needs to be showing in order to get a court-appointed attorney at the "summary judgment stage" is different and higher than that which needs to be showing in order to get a court-appointed attorney at the "motion to dismiss" stage, and indicating that the amount of merit that needs to be showing in order to be appointed the court-appointed attorney is the same amount of merit that needs to be showing to pass <u>whatever</u> stage the case is at (meaning, for instance, that the amount of merit that needs to be showing in order for the court to appoint an attorney <u>at the</u> summary judgment stage is the same amount of merit that needs to be showing in order <u>to defeat</u> the summary judgment motion), when in so requiring that amount/level of merit and having it be

stage-dependent, they (the courts below) ruled contrary to and beyond the minimal/minimum showing of merit (a showing that is not dependent on what stage the case is at) as required by Bradshaw, the leading authority on the subject in the 9th Circuit, and by Caston vs. Sears, Roebuck, Inc.,[3] cited by Bradshaw.

2. Whether the District Court prejudicially erred in granting summary judgment against plaintiff when the court, via its summary judgment order, in effect, allowed defendant (a government agency who contracts federal funds, who is an arm of the state, who discriminated against

---

[3]556 F.2d 1305 (5th Cir. 1977)

plaintiff on the basis of her race (black), sex, and age with regard to promotions/jobs/positions, transfers, and training, and who deprived her of her property and liberty rights not to be discriminated against on the basis of her race, sex, and/or age and of her right to have equal protection, including equal access and equal opportunity to promotions/jobs/positions, to transfers, and to training) to override federal and constitutional law by its backing defendant's view, with respect to the summary judgment motion, that they (defendant) have total discretion as to their employees' access and opportunity to promotions/jobs/positions, to transfers and to training, and by backing their (LAUSD's) view that their employees have

no property or liberty interests in equal access or in equal opportunity to promotions/jobs/positions, to transfers and to training (equal access and equal opportunity being that access and opportunity that is not abrogated or abridged by such arbitrary and capricious exercise of official discretion as discrimination based on race, sex, and/or age; such discrimination being a substantive transgression and against public policy), when, in fact,

a. Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. Sections 1981 and 1983, the Age Discrimination in Employment Act (ADEA), and the Fourteenth Amendment to the United States Constitution and its Equal Protection and Due

Questions Presented

Process clauses put substantive limitations on the exercise of official discretion, indicating that an employer such as defendant does not have unfettered discretion with respect to, for instance, impermissible discrimination (including race-, sex-, age-based discrimination, against employees),

b. Title VII, Section 1981, Section 1983, ADEA, and the Fourteenth Amendment put substantive limitations on the exercise of official discretion, thereby creating protected liberty interests with respect to those limitations,

c. A property interest exists for the employee in that s/he has a legitimate claim of entitlement

(arising from those statutes) to the right not to be discriminated against on the basis of, among other things, race, sex, and/or age in employment with respect to, among other things, access to and opportunity for promotions/jobs/positions and training (including the right to make and enforce contracts with respect to promotions/jobs/positions),

d. There exists the liberty interest to engage in a chosen profession free from unreasonable, arbitrary, capricious, and improper governmental interference (such as race-, sex, age-based discrimination) as a matter of substantive due process; that is, the employee has a right

to, among other things, equal access and to equal opportunity to promotions/jobs/positions, transfers, and training,

e. Defendant cannot override federal or constitutional laws and does not have unfettered discretion to abrogate or to abridge the substantive rights of the employee secured by those laws, because those employee's rights, in line with the Tinker vs. Des Moines School Distr. ("Tinker") decision regarding students rights, do not stop at the schoolhouse door, regardless of whether defendant retains some discretionary powers about other things and is a school, rather than some other government contractor,

f. When a state actor, such as defendant, violates substantive rights of a person, violation of the Fourteenth Amendment's due process clause is complete at the time of the deprivation of those rights and postdeprivation hearings or other schemes will not undo the violation or keep the due process clause from being violated.

3. Whether the District Court prejudicially erred in not allowing plaintiff to amend her Third Amended Complaint when plaintiff's attorney (before her instant substitution of herself out of plaintiff's case, less than one month before the scheduled trial date and without prior notice to plaintiff) put

on the Third Amended Complaint numerous inaccuracies, false/erroneous statements without plaintiff's knowledge, awareness, authorization, causing plaintiff's case to suffer at every stage because of that messed-up Third Amended Complaint.

4. Whether the District Court prejudicially erred and abused its discretion in granting summary judgment against the plaintiff when the court (advised of her severe health problems and disabilities, her financial and other substantial problems and mitigating circumstances) denied her several requests for court-appointed attorney, denied her opportunity to amend the third amended complaint of the case, denied her additional and needed discovery (including

needed statistical evidence), and denied her sufficient time and reasonable opportunity to litigate her meritorious and complex, essentially Title VII employment discrimination case (suddenly thrust upon her when her attorney, without prior notice to her (plaintiff), instantly substituted herself out of the case less than one month before the scheduled trial date), and thereby highly prejudicing the successful outcome of her case, causing an outright miscarriage of justice to her (plaintiff), and allowing for a far too drastic of a measure, summary judgment, to be taken against her.

5. Whether the District Court prejudicially erred in granting summary judgment against plaintiff when she, in

her Opposition papers to the summary judgment and in her other court documents, introduced ample evidence, including evidence showing that she met the McDonnell Douglas vs. Green[4] burden (that is, she qualified for, applied for, but was rejected for available/vacant positions which remained open after she applied, sometimes for long periods of time, until whites filled them, and which she continually sought, before and after LAUSD's arbitrary, subjective appointments of selected non-blacks, usually whites, who were usually younger and no more qualified than, if as much as, she, or were of comparable qualifications), showing, or at the least clearly

---

[4]411 U.S. 792, 93 S.Ct. 1817 (1973)

inferring, that defendant's continuing denial, for numerous years, of transfers, of requisite training and experience (T & E) to pass their administrative promotional exams, and of promotions to her and to most other black teachers at LAUSD's Polytechnic and Granada High Schools; showing (or inferring) that defendant's continued rejection of her and other blacks in favor of non-blacks, mostly whites, and usually younger than she, for numerous, regularly vacant pre-administrative positions/jobs, for which there were no special qualifications, for which plaintiff and other blacks were continually qualified, for which she and other blacks, according to those blacks, continually applied, but were denied, and for which she continued to need in order

to obtain necessary T & E required to pass the first stage of LAUSD's promotional exams and, thereby, to have opportunities to pass the overall exam and to advance in her vocational/professional career with LAUSD; showing (or inferring) that their subterfugedly taking away from her two jobs she successfully held, with no plausible or justifiable reasons for doing so, and giving those positions to a white male, younger than she, who was no more qualified than, if not as much as, she; and showing (or inferring) that the continual extremely hostile working environment at LAUSD that blacks endured--were all based on impermissible factors, including plaintiff's race, age, sex and double standards by defendant (causing plaintiff to be locked into a classroom

position, as were most other blacks), and those denials, rejections, and taking away of promotions/positions/jobs and the denials of transfers and training (and/or the reasons therefor) were pretexts for discrimination on LAUSD's part, was done knowingly and intentionally, in favor of and in preference for non-blacks, mostly whites, and in violation of plaintiff's rights not to be discriminated against (with respect to employment) on the basis of her race, sex, and/or age; of her right to have equal protection (including equal access and equal opportunity to promotions/jobs/positions, transfers, and training); and of her liberty right to to engage in her chosen profession free from such unreasonable, arbitrary, capricious, and improper governmental interference, as

secured by Title VII of the Civil Rights Act of 1964 (with respect to the race, sex discrimination), 42 U.S.C. Sections 1981 (with respect to the race discrimination) and Section 1983 (with respect to the race, sex, age discrimination), ADEA (with respect to the age discrimination), and the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution (with respect to the equal protection and liberty rights).

6. Whether the District Court, ruling that there were continuing violations on the part of defendant, prejudicially erred in granting summary judgment against plaintiff and in favor of the defendant, Los Angeles Unified School District.

7. Whether the District Court prejudicially erred and abused its discretion in dismissing plaintiff's 42 U.S.C. Section 1981 ("Section 1981") claim and in granting summary judgment against plaintiff when the court wrongfully construed plaintiff's burden (for her Opposition to the summary judgment motion, with respect to plaintiff's Section 1981 claim) to be that it was necessary for her to, but that she did not, make a showing, under Patterson vs. McLean Credit Union[5], that the promotions/jobs/positions she sought would have involved the "opportunity for a new and distinct relation" between her and her employer (the defendant), when

---

[5] __U.S.__, 109 s.Ct. 2363, 2376-77 (1990)

a. Defendant, in its summary judgment motion, did not address whether, and did not bring forth the subject or any facts or evidence or anything else stating that, plaintiff did not or could not meet the above-mentioned requirement under Patterson,

b. Defendant, in its summary judgment motion, did not address whether, and did not bring forth any facts or evidence showing that, the promotions/jobs/ positions that plaintiff sought did not provide "opportunity for a new and distinct relation" between plaintiff and her employer,

c. Defendant, in its summary judgment motion, did not address, and did not

bring forth any facts, evidence, or discussion stating or otherwise showing what constitutes an "opportunity for a new and distinct relation" between plaintiff and her employer (defendant) with respect to promotions/jobs/ positions,

d. Plaintiff was deprived of the opportunity to address whether she could meet the "opportunity for a new and distinct relation" requirement under Patterson, or whether the promotions/jobs/ positions she sought provided that Patterson requirement, or what constitutes an "opportunity for a new and distinct relation" between her and her employer,

e. It was not incumbent upon plaintiff

and it was not plaintiff's burden to bring forth any evidence or facts to oppose any fact, point, argument, and so forth not brought forth in the summary judgment moving papers,

f. The court cannot summary adjudicate, summary judge any claim upon any basis not brought forth by the summary judgment/ adjudication moving papers.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceeding before the Ninth Circuit are as follows:

1. Plaintiff-Appellant-Petitioner: Ellen Braswell, teacher, Los Angeles Unified School District (LAUSD)

2. Defendant-Appellee-Respondent: Los Angeles Unified School District (LAUSD)

TABLE OF CONTENTS

PETITION PROPER

QUESTIONS PRESENTED . . . . . (i.1)

Question 1 . . . . . (i.1)

Question 2 . . . . . (i.3)

Question 3 . . . . . (i.9)

Question 4 . . . . . (i.10)

Question 5 . . . . . (i.11)

Question 6 . . . . . (i.16)

Question 7 . . . . . (i.17)

LIST OF ALL PARTIES TO THE PROCEEDING . . . . . (ii)

TABLE OF CONTENTS . . . . . (iii.1)

TABLE OF AUTHORITIES . . . . . (iv.1)

PETITION FOR A WRIT OF CERTIORARI . . 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL & STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

PETITION PROPER (conint.)

REASONS FOR GRANTING THE WRIT 15

1. THE DISTRICT COURT ERRED IN NOT APPOINTING PLAINTIFF AN ATTORNEY TO HANDLE HER COMPLEX TITLE VII CASE 15

2. THE DISTRICT COURT ERRED IN ITS GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF 21

3. THE DISTRICT COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND HER 3RD AMENDED COMPLAINT AND IN NOT LETTING HER GET ADDITIONAL DISCOVERY 24

CONCLUSION 27

APPENDIX

(Under Separate Cover)

TABLE OF CONTENTS . . . . . (iii.1a)

APPENDIX (contin.)

TABLE OF AUTHORITIES . . . . . (iv.1a)

Cases . . . . . (iv.1a)

Constitutional Provision . (iv.6a)

Federal Statutes . . . . . (iv.7a)

State Statutes . . . . . (iv.9a)

Local Rules . . . . . (iv.9a)

MEMORANDUM OF THE COURT OF APPEALS . 1a

ORDER OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 13a

VARIOUS DISTRICT COURT ORDERS

Order Dismissing Plaintiff's First Amended Complaint . 65a

November 6, 1990 . . . . . 68a

February 28, 1991 . . . . . 71a

Order Denying Plaintiff's Ex Parte Application . . 74a

Civil Minutes--General 79a

Civil Minutes--General 81a

APPENDIX (contin.)

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING 84a

MEMORANDUM OF THE COURT OF APPEALS 86a

ORDER OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 98a

VARIOUS DISTRICT COURT ORAL PROCEEDINGS

October 1, 1990 . . . . . 150a

November 5, 1990 . . . . . 158a

November 26, 1990 . . . . . 169a

CONSTITUTIONAL PROVISION

Amendment XIV, United States Constitution 176a

FEDERAL STATUTES

Title VII, Civil Rights Act of 1964 (as amended) [United States Code, Title 42, Sec. 2000e et seq.] 177a

Section 701. [Sec. 2000e] Definitions 177a

APPENDIX (contin.)

FEDERAL STATUTES (contin.)

Title VII (contin.)

Section 703. [Sec. 2000e-2] Unlawful employment practices 180a

Section 704. [Sec. 2000e-3] Other unlawful employment practices 187a

Section 706. [Sec. 2000e-5] Prevention of Unlawful Employment Practices 188a

Section 708. [Sec. 2000e-7] Effect on state laws 190a

United States Code, Title 42

Section 2000e et seq. . . 177a

2000e. Definitions . 177a

2000e-2. Unlawful employment practices 180a

2000e-3. Other unlawful employment practices 187a

APPENDIX (contin.)

FEDERAL STATUTES (contin.)

United States Code,
Title 42 (contin.)

Section 2000e et seq. (contin.)

2000e-5. Prevention of unlawful employment practices . . . 188a

2000e-7. Effect on state laws . . 190a

Section 1981 . . . . . 191a

Section 1983 . . . . . 192a

DECLARATIONS

Allan Ruttenberg, M.D. 193a

Ellen Braswell 202a

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 106 S.Ct.
2505, 2512 (1986) . . . 21a, 57a, 106a, 142a

Barthuli v. Board of Trustees
19 Cal.3d 717, 722,
139 Cal. Rptr. 627
(1977) 59a, 144a

Board of Regents v. Roth
408 U.S. 564, 92 S.Ct.
2701 (1972) 60a, 145a

Bradshaw vs. Zoological Soc.
of San Diego
662 F.2d 1301 (9th Cir.
1981) . . . . . (i.1), (i.3) 15-18, 9a, 10a, 73a, 78a, 94a, 95a

Bullock v. Sweeney
644 F.Supp. 507, 508
(N.D. Cal. 1986), aff'd
823 F.2d 554 . . . . . 23a, 108a

Caston v. Sears, Roebuck & Co.
556 F.2d 1305
(5th Cir. 1977) . . . . (i.3), 15

Celotex Corp. v. Catrett
477 U.S. 317, 106 S.Ct.
2548, 2553 (1986) . . . 21a, 106a

CASES (contin.)

Cleveland Board of Education
v. Loudermill
470 U.S. 532,
105 S.Ct. 1487
(1985) 59a, 144a

Del Percio v. Thornsley
877 F.2d 785 (9th Cir.
1989) 58a, 143a

Falls Riverway Realty, Inc.
v. Niagra Falls
754 F.2d 49
(2d Cir. 1985) . . 21a, 106a

Goodman v. Lukens Steel Co.
482 U.S. 656, 107 S.Ct.
2617 (1987) 58a, 143a

Grant v. Adams
69 Cal.App.3d 127, 132,
137 Cal. Rptr. 834,
(1977) 59a, 144a

Haines v. Kerner
404 U.S. 519, 520-21
(1972) 11a, 23a,
96a, 108a

International Brotherhood of
Teamsters v. United States
431 U.S. 324,
97 S.Ct. 1843
(1977) 29a, 114a

CASES (contin.)

Kromnick v. School District of Philadelphia
739 F.2d 894 (3rd Cir. 1984) 47a, 132a

Loehr v. Ventura County Community College District
743 F.2d 1310, 1317 (9th Cir. 1984) . . 60a, 145a

Maclin v. Freake
650 F.2d 885 at 887-888 (7th. Cir. 1981) 19

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.
475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986) 23a, 108a

McDonnell-Douglas Corp. v. Green
411 U.S. 792, 93 S.Ct. 1817 (1973) . . . . (i.12), 29a, 30a, 45a, 114a, 115a, 130a

Mitchel v. General Electric Co.
689 F.2d 877, 879 (9th Cir. 1982) 22a, 46a, 107a, 131a

CASES (contin.)

Morgan v. Harris Trust and Sav. Bank of Chicago
867 F.2d 1023 (7th Cir. 1989) 23a, 108a

Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec
854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam) 4a, 6a, 7a, 22a, 89a, 91a, 92a, 107a

Patterson v. McLean Credit Union
__U.S.__, 109 S.Ct. 2363, 2376-77 (1990) . . (i.17), (i.18), (i.19), 63a, 148a

Reed v. Lockheed Aircraft Corp.
613 F.2d 757 (9th Cir. 1980) 25a, 110a

Rizzo v. Dawson
778 F.2d 527, 529-30 (9th Cir. 1985) 11a, 96a

CASES (contin.)

Schneider v. TRW, Inc.
938 F.2d 986, 990 n.2
(9th Cir. 1991)
(citing Hydrolec,
854 F.2d at 1545) 6a, 91a
(citing Szewiola,
et al. v. LAUSD,
Case No. CV 80-3348 WMB
(C.D. Ca. 1981) 54a, 139a

Szewiola, et al. v. LAUSD,
Case No. CV 80-3348 WMB
(C.D. Ca. 1981) 54a, 139a

Texaco, Inc. v. Ponsoldt
939 F.2d 794, 798
(9th Cir. 1991) 11a, 96a

Texas Dept. of Community Affairs
v. Burdine
450 U.S. 248, 253,
101 S.Ct. 1089,
1093 (1981) 30a, 45a,
115a, 130a

Tinker . . . . . (i.8), 22

Tucker v. Roach
163 Cal.App.3d 1051,
210 Cal. Rptr. 295
(1985) 59a, 144a

CASES (contin.)

United Air Lines, Inc. v. Evans
431 U.S. 553, 97 S.Ct.
(1977) 26a, 111a

United States v. Mandel
914 F.2d 1215, 1219
(9th Cir. 1990) 8a, 93a

Watson v. Fort Worth Bank and Trust
108 S.Ct. 2777
(1988) 31a, 39a,
57a, 116a,
124a, 142a

Williams v. Owens-Illinois, Inc.
665 F.2d 918 (9th Cir.
1982) 26a, 111a

Wilson v. Garcia
471, U.S. 261, 105 S.Ct.
1938 (1985) 58a, 62a,
143a, 147a

CONSTIUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISION

Amendment XIV, United States
Constitution . (i.5), (i.6), (i.9),
(i.16), 22, 59a, 144a

FEDERAL STATUTES

Federal Rules, Appellate Procedure

Rule 3(c) 72a

Rule 4(a) 72a

Federal Rules, Civil Procedure

Rule 12(b)(6) . . . 11a, 17a, 66a, 96a, 102a

Rule 15(a) 66a

Rule 56(e) 3a, 20a, 21a, 22a, 88a, 105a, 106a, 107a

Rule 56(f) 8a, 93a

Age Discrimination in Employment Act (i.5), (i.6), (i.16)

Title VII, Civil Rights Act of 1964 (as amended) . (i.1), (i.5),(i.6), (i.11), i.16), 3, 2a, 10a, 16a, 17a, 25a, 27a, 28a, 30a, 39a, 40a, 42a, 44a, 45a, 47a, 56a, 57a, 65a, 77a, 87a, 95a, 101a, 102a, 110a, 112a, 113a, 115a, 124a, 125a, 127a, 129a, 130a, 132a, 141a, 142a

FEDERAL STATUTES (contin.)

United States Code

Title 28, Section 1254(1) . . . 3

Title 42

Section 1981 . (i.5), (i.6), (i.16), (i.17), 3, 3a, 17a, 62a, 63a, 65a, 88a, 102a, 147a, 148a

Section 1983 . (i.5), (i.6), (i.16), 3, 23, 3a, 10a, 17a, 18a, 57a, 58a, 59a, 61a, 65a, 88a, 95a, 102a, 103a, 142a, 143a, 144a, 146a

Section 2000e et seq. (Title VII, Civil Rights Act of 1964 (as amended)) . . (i.1), (i.5), (i.6), (i.11), (i.16), 3 2a,10a, 16a, 17a, 25a, 27a, 28a, 30a, 39a, 40a, 42a, 44a, 45a, 47a, 56a, 57a, 65a, 77a, 87a, 95a, 101a, 102a, 110a, 112a, 113a, 115a, 124a, 125a, 127a, 129a, 130a, 132a, 141a, 142a

STATE STATUTES

CALIFORNIA CODE

Civil Procedure, Sec. 340 . . 58a, 62a, 143a, 147a

Education

Section 44893 . . . . . 59a, 144a
Section 44894 . . . . . 59a, 144a
Section 44897 . . . . . 59a, 144a

LOCAL RULES

CENTRAL DISTRICT OF CALIFORNIA

Rule 7.14.2 . . . . . 5a, 7a, 90a, 92a

Rule 7.14.3 . . . . . 5a, 7a, 90a, 92a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ELLEN BRASWELL,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 11, 1993, a petition for rehearing having been denied

by order of the Ninth Circuit entered on May 4, 1993, and review of the District Court's summary judgment order which was entered February 7, 1991. The District Court is in the Central District of California.

OPINIONS BELOW

A copy of the Memorandum (opinion) of the Court of Appeals for the Ninth Circuit and of their order denying my requested rehearing are in the Appendix at App. 1a and 84a, respectively. The District Court's summary judgment order is in the Appendix at App. 13a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 11, 1993. A timely Petition for Rehearing was filed on March 12, 1993. The Court of Appeals' denial of

the Petition for Rehearing was filed on May 4, 1993. This Court's jurisdiction is invoked under Title 28 U.S.C. Sec. 1254(1) and under pendent jurisdiction.

CONSTITUTIONAL & STATUTORY PROVISIONS

1. Amendment XIV, United States Constitution: Appendix at 176a
2. 42 U.S.C. Sec. 1981: Appendix at 191a
3. 42 U.S.C. Sec. 1983: Appendix at 192a
4. Title VII of Civil Rights Act of 1964 (as amended): Appendix at 177a

STATEMENT OF THE CASE

Plaintiff-Appellant-Petitioner, Ellen Braswell, is employed by the Los Angeles Unified School District (LAUSD) as an English teacher and has been since about 1973. Also, she has taught drama and history. She has A.A., B.A., and M.A.

degrees, the latter two in English and in Curriculum & Instruction, obtained from the University of California at Los Angeles (UCLA) and from the University of San Francisco (USF), respectively (R2035-2036). She worked on a Ph.D. in Educational Administration at the University of Southern California (USC) in 1980, successfully completing five courses, among which were courses in the principalship and in Organization and Administration of Public Schools.

Braswell has both teaching (R1014, ln. 11-13) and administrative credentials (R1015, ln. 8-10)--administrative credential since 1977 that she has kept renewed, and a standard teaching (life) credential with a minor in both social studies and in history. She has numerous honors, awards, certificates, and letters of appreciation and commendations from

district officials and from others for the volunteer work that she did, whenever the opportunity presented itself (R2055-2099).

Braswell aspired to administrative-level positions in LAUSD (dean, vice principal, principal, and superintendent) and did everything within her power to obtain those goals, including trying to get pre-administrative experiences necessary to pass LAUSD's promotional exams, taking those promotional exams, obtaining more credentials, and pursuing higher education degrees. However, her aspirations were thwarted, unjustifiably, because of LAUSD'S consistent, deliberate, and intentional refusal over approximately 14 years (Appellate Opening Brief, p.4) to allow her pre-administrative experiences/ promotions (R1638, ln. 1-4), and because of LAUSD's, among other things, systematic refusal to allow her positions which

carried some type of remuneration (except for yearbook in 1984, which she volunteered to sponsor because the seniors were without a sponsor that year), all because of plaintiff's race, age, and/or gender. However, nonwhites, specifically blacks, were treated differently than whites in the predominantly white-area, white-dominated schools (Polytechnic and Granada Hills High Schools) where plaintiff was employed. Plaintiff even applied to another school district, the San Bernadino School District (R1569, ln. 5-25; R1570, ln. 1-25; R1571, ln. 1-25; R1572, ln. 1-25; R1573, ln. 1-10; R174, ln. 2-25), to 1) avoid LAUSD's oppressive and malicious actions, including their race-, sex-, and age-based discrimination, and to 2) perhaps have an opportunity to advance in her career.

Plaintiff has always been a loyal

employee with excellent references from principals regarding her character, and her teaching and disciplinary abilities. Yet, those same principals refused her meaningful pre-administrative experience (since they knew she could pass the promotional exams), even though she continued to ask them to allow her to get that experience, without which she could not pass the overall exam. Therefore, she was blocked from advancing in her educational and vocational careers because of the principals' continued discriminatory denial of pre-administrative positions for which there were no prerequisites or qualifications, except being a classroom teacher.

Some of LAUSD's discriminatory actions included continually not allowing Braswell to transfer from Poly to other schools within the District and refusing

to grant any of her numerous applications for a teacher-initiated transfer, claiming that she was needed at Poly for ethnic balance (although their written policy regarding transfers was contrary to what they actually did) (R1667, ln. 7-8). In 1985, after Braswell wrote a letter to the school board president requesting that she be transferred, she was transferred to Granada Hills High School via an administrative transfer, not via a teacher-initiated transfer.

Another example of LAUSD's discriminatory actions was their refusal to let Braswell teach honors classes at Poly and at Granada. Although Braswell applied to teach honors English classes each semester from approximately Spring 1976 to June 1988 (approximately 24 semesters), she was continually not allowed to teach those classes. Braswell

was at all times qualified to teach honors English classes. While Braswell was at Poly (from approx. January 1976 through June 1985), no black teacher was allowed to teach honors English classes, even though they applied to teach them. At Poly during those years mentioned, there were, during any one semester, approximately 2 black, long-term, permanent teachers out of a faculty of approximately 20 English teachers. While Braswell was at Granada (from September 1985-June 1988), only a black teacher out of a faculty of approximately 15 English teachers) taught honors classes. Braswell applied to teach honors classes but was continually denied those classes.

The District's pattern of harassment included bouncing Braswell from room to room, as many as three times in <u>one</u> semester, after she had already cleaned up

and arranged the previous room, and in each case, assigning Braswell's clean room to a white teacher who desired it, or assigning it for some other sham excuse the principal (Falotico at Granada) used. When Braswell confronted Falotico about the matter, Falotico's remarks were to the effect that Braswell did not own the rooms, that she (Falotico) could do what she wanted to, that she (Falotico) was well aware that there were other rooms on campus (said in response to Braswell's response that there were other rooms available that those teachers could use), and that that was the way it was going to be. Most white permanent teachers were allowed to keep their rooms from year to year, unless they desired a change.

Braswell also had to be subjected to a racially hostile atmosphere on campus and to racially derogatory remarks.

Braswell was also Stulled (given another performance evaluation) by the same principal, Falotico, in 1985, even though Braswell had just been Stulled within the year before, at Poly, and even though permanent teachers are Stulled every two years, unless there is a major problem with them, which was not the case with Braswell, since administrators and others always said that she was an outstanding teacher, and since she always got excellent evaluations, except for one retaliatory one which the District had to clear up. Administrators would say, in Braswell's presence and/or to Braswell, such things as "We need some young faces around here doing things" (R1448, ln. 16-17), "When are you going to retire," and "We need some young teachers on this faculty." And, there was constant pressure to retire. This pressure from

LAUSD for Braswell to retire continued into Braswell's industrial stress illness/ injury leave which she has been on since some time in September 1988. Braswell got a barrage of bulletins, memos, and so forth regarding retirement and was given a retirement identification number on her health insurance cards from LAUSD.

Some jobs/positions that Braswell applied for were the following:

1) Peer Counseling. Braswell initiated the program at Granada Hills High School in Fall 1985 (Deposition of Ellen Braswell, R1267, ln. 8; R1217, ln. 17-24; R1272, ln. 4-8; R1275, ln. 23-25; R1276, ln. 1-13). The principal approved Braswell holding the job and then later, in about June 1986, took the job, away from plaintiff and gave it to a white male younger than she, Mr. Alpert, using diversionary tactics to give it to whom

she really wanted to have the position, Mr. Kakassy, who did not, according to him, have a Pupil Personnel Credential either. The principal took the job away from Braswell, saying Braswell needed such a credential.

2) In-House Dean. Braswell applied for the position numerous semesters (R1291, ln. 7-10; R1292, ln. 1-20) at Poly, from approximately 1978 to June 1985, and at Granada, from 1985-88. The position was open each semester, each year.

3) Black Students' Club Sponsor. At Granada Hills High School, September, 1985, Braswell applied for the position (R1318, ln. 6-25; R1319, ln. 1-18), but Principal Falotico denied her the position, saying that she wanted to foster unity, not division; yet at the same time, there were several other ethnic clubs on

campus at Granada.

5) Test Coordinator. Braswell applied, but was denied the chance to vie for the position (R1323, ln. 1-16; R1325, ln. 11-25; R1326 (1-19); R1327 (23-25). Braswell was informed approximately five minutes before the end of school that the meeting was to take place that afternoon to select candidates. Principal Falotico had already said that she thought Holodnik would be the best candidate for the position. The committee voting for the Test Coordinator was hand-selected by the principal, and the excuse for the little notice given to Braswell was that that was the only time that the committee could meet. Yet, the position was not going to be filled until the following semester. Holodnik was selected for the position.

6) School-Site Mentor Teacher. Braswell applied for the position after

the principal advertised it in the school bulletin and during the same day of and at the end of the class period in which the bulletin was put out. After Braswell applied for the position, the principal denied it to her, but later hired a white male (Mr. Schultz) out of retirement to fill the position. After he left, she got a white female to fill the position.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT ERRED IN NOT APPOINTING PLAINTIFF AN ATTORNEY TO HANDLE HER COMPLEX TITLE VII CASE.

The district court based its denial of court-appointed attorney to plaintiff on the merit factor of Bradshaw vs. Zoological, 662 F.2d 1301 (9th Cir. 1981), saying that plaintiff did not meet that factor. The Bradshaw court, which is also from the 9th Circuit, agreed with the Court in Caston v. Sears, Roebuck & Co.,

556 F.2d 1305 (5th Cir. 1977), the most common source for the test regarding appointment of counsel based upon the merits. According to the Court in Caston, the merit factor to be assessed in determining whether to appoint counsel "...means only that the plaintiff must show that the claim has some merit...," and "does not, under any circumstances, require the court to become 'enmeshed' in the issues involved in a determination of the merits." The merit factor, as agreed by the Courts in Bradshaw and in Caston, is met when the plaintiff shows some merit. Caston further states, "...merit required in [appointment of counsel] is minimal and incidental." The appellate court in the instant case said, "...the [district] court decided that, in the face of...defendant's motion for summary judgment and the evidence presented thus

far in opposition to it, the [plaintiff's] claim lacked merit". And, the appellate court further indicated, in footnote 2 of its Memorandum, that since the plaintiff, Braswell, was at the summary judgment stage of the case, the level of merit necessary to be showing is different than that that was necessary in Bradshaw, and continued by saying, "...the question of merit is different from whether the pleadings are adequate to support a claim [as in Bradshaw]." However, this is in direct contradiction to Bradshaw's decision which bases its merit factor in Caston. Caston says that the merit necessary to be showing is "minimal and incidental." Therefore, the amount of merit necessary does not depend on what stage of the case that the applicant for a court-appointed attorney in a Title VII case is at. If the level of merit were

dependent on the stage of the case, then the amount of merit necessary could and would have to be more than minimal at different stages of the case, since different stages require different levels of merit to show. The Bradshaw court said, "The decision to deny the assistance of appointed attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had." But, the district court did wait. Plaintiff's case survived several motions to dismiss by defendant, so there was at least some merit showing.

The "district court may examine the factual issues in the case to determine whether counsel is needed to investigate and marshall the facts. If the litigant can handle the factual issues, it may not

be necessary to appoint counsel. See Maclin v. Freake, 650 F.2d 885 at 887-888 (7th Cir. 1981)." Plaintiff did all that she could to oppose the summary judgment motion; however, there were mitigating circumstances, including the fact that

1) She was a lay person with no legal training and little or no legal knowledge,

2) The case was suddenly dropped in her lap to handle by herself without legal counsel (by her attorney, who after handling the plaintiff's case for approximately two years, suddenly, without any prior notice, substituted herself out of plaintiff's case on August 6, 1990, two weeks after defendant had filed the summary judgment motion and less than one month before the scheduled trial date)

3) She had (and still has) very serious health problems and was on an industrial stress illness/injury leave

from work since approximately September, 1988 (Her health problems include(d) extremely high high blood pressure and cholesterol levels, and depression (App. 194a). She was just recently hospitalized because of chest pains).

The district court, in its summary judgment order, said that plaintiff met her burden of showing present and on-going violation of constitutional rights, and that plaintiff proved continuing violations. Also, LAUSD did not meet its burden of articulating a nondiscriminatory reason for refusing to allow plaintiff to be a teacher of honors English classes. Plaintiff applied numerous years to teach honors classes but was never allowed to teach them. Plaintiff was at all times qualified to teach those classes.

2. THE DISTRICT COURT ERRED IN ITS GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF.

There were triable issues of fact remaining, so summary judgment should not have been granted. The district court, in its summary judgment order, said that plaintiff met her burden of proof of proving continuing violations, that she showed a present and on-going violation of constitutional rights, that she produced evidence of the continuing nature of the alleged discrimination, that on June 14, 1988, she again unsuccessfully applied for the position of In-House Dean, and that she had been adversely affected by the District's alleged policy within the limitations period. This is a prima facie case for Title VII.

The district court also misconstrued plaintiff's property and liberty

interests. Plaintiff was given by Title VII and the Constitution the right to equal access to jobs/positions and the right not to be denied those positions on the basis of her race, sex, and age. The state cannot preempt those federal rights. Plaintiff's rights do not stop at the "school house door," as was proven in Tinker. So, although plaintiff may not have a property interest in holding the pre-administrative jobs/positions, she does have property and liberty interests while on (in) the jobs/positions, including the right to equal access to jobs and the right not to be taken out of a job on the basis of her race, sex, and/or age. Plaintiff's liberty interests were violated when she was denied the pre-administrative positions on the basis of her race, sex, and/or age because she needs those positions to pass LAUSD's

promotional exams. LAUSD did not have a training program when she applied for the pre-administrative positions or when she applied for promotional exams, and hence, for administrative positions. So, she was very stigmatized, and such discrimination did prevent her opportunities to other positions. So, a triable issue still remains as to Section 1983.

The district court in deciding whether "In-House" dean provides plaintiff a new and distinct relationship with LAUSD made a fact determination. Also, no such facts as to whether such a position does or does not provide a new and distinct relationship were ever in LAUSD's summary judgment moving papers or anywhere else on the record. Plaintiff did not have even the opportunity to address this during the motion since she was not aware of the argument, because defendant had not

presented it. Thus, the district court cannot base its judgment on information not presented by the summary judgment moving papers. And so, a triable issue still remains as to 42 U.S.C. Section 1981.

3. THE DISTRICT COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND HER 3RD AMENDED COMPLAINT AND IN NOT LETTING HER GET ADDITIONAL DISCOVERY.

Plaintiff's attorney did not let plaintiff see the 3rd Amended Complaint before she substituted herself out of the case. That complaint contained much unfounded, false, and erroneous information (unauthorized by plaintiff), so plaintiff needed to have it corrected. Plaintiff also needed to have claims reinstated that her attorney dropped from the complaint without plaintiff's knowledge, awareness, or approval. The

district court dismissed plaintiff's first amended complaint without prejudice to allow her attorney to present late claims to LAUSD regarding her pendent state claims. Plaintiff was not aware of any problems with any of the claims that her attorney dropped (all of which she dropped without plaintiff's knowledge, awareness, or consent). Also, plaintiff needed the amendment to assert new and meritorious causes of action and to add other defendants which plaintiff's attorney failed to add. There were mitigating circumstances, also, including the fact that plaintiff's attorney conducted inadequate discovery, did not keep plaintiff sufficiently informed of what was going on in the case, and substituted herself out of the case without prior notice to plaintiff, leaving plaintiff, a lay person with no legal training and with

serious health problems (medically documented) not only to defend against the summary judgment motion (less than one month before the scheduled trial date) but also to meet numerous impending deadlines. Plaintiff's attorney also left plaintiff with past due deadlines. Also, plaintiff's attorney knew that plaintiff had serious health problems, an impending marital dissolution, and a seriously ill dependent daughter (who, approximately 11 days after the attorney substituted out of the case, tragically died). The short continuances were not sufficient for plaintiff, with all her mitigating circumstances, to handle such a complex Title VII employment discrimination case without counsel in the few (approximately 4) continuances allowed by the district court. Had the district court allowed one long continuance instead of the four short ones, then plaintiff

could have gotten more done and could have better defended against the summary judgment motion.

CONCLUSION

Plaintiff respectfully requests that the court remand the case to district court so that she can amend the complaint, finish discovery, and have the requested jury trial--have her day in court.

Respectfully submitted,

Ellen Braswell
4034 North Joelton
Agoura, California 91301
(818) 991-0590

September, 1993 Petitioner, In Pro Per

(Plaintiff has not finished this Petition for Writ of Certiorari and would appreciate it if the court would extend the time a few days more so that she can finish her arguments. She is still in ill

health and, as said before, was just recently hospitalized with chest pains.)